

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

MALCOLM BOYKINS,

Defendant-Appellant.

UNPUBLISHED

July 13, 2004

No. 247050

Oakland Circuit Court

LC No. 02-185676 FH

Before: Markey, P.J., and Wilder and Meter, JJ.

PER CURIAM.

Defendant appeals by right his convictions for felon-in-possession of a firearm, MCL 750.224f, discharge of firearm at dwelling, MCL 750.234b, and two counts of possession of a firearm during the commission of a felony (felony firearm), MCL 750.227b, following a jury trial. We affirm.

I. Facts and Proceedings

Defendant's convictions arise out of an incident occurring at the Pontiac home of Tracy Coleman on the evening of July 5, 2002. Coleman testified at trial that she had known defendant for about 12 years, that the two had been engaged for much of that time, and that after they broke off their engagement, she believed they remained friends. According to Coleman, she and defendant had seen each other in the days leading up to the incident at issue.

Coleman further testified that on the evening of July 5, 2002, she began receiving phone calls from defendant around 10:00 p.m. During one of the calls defendant asked Coleman to meet with him, but she refused and defendant became angry. During another of the calls from defendant her friend, Kevin Franklin answered the phone despite her instructions to Franklin not to answer. Coleman testified that after Franklin answered the phone, she instructed him to hang up the phone and not anger defendant further. She understood after Franklin hung up that defendant had indicated his intention to come to her home to cause damage to it.

Franklin testified that he answered the phone three times that night and that on each occasion defendant was the caller. Franklin testified that the first of the three calls he answered came at approximately 10:30 p.m., that each call lasted approximately five minutes, and that defendant threatened him at the end of each of the calls.

Coleman and Franklin each testified that shortly after midnight they saw defendant drive a burgundy Cadillac in front of the house before turning the vehicle into a small parking lot across the street. Coleman then went out on her front porch to investigate what defendant was doing. Defendant turned the car to face Coleman's house, stopped and turned off the headlights, and moved to the front passenger seat of his vehicle. While Franklin and Coleman were watching defendant and his vehicle, both of them saw defendant stick his hand out of the car window and begin to fire a shotgun toward Coleman and her house. Coleman and Franklin both testified that they saw the muzzle flashes of the gunshots. Coleman testified that she ran back into the house and ran upstairs to call 911 from her bedroom. While running up the stairs she thought she heard bullets hitting her house on the roof over the front door. Franklin testified that he ducked down on the floor inside the house and that he thought he heard bullets hitting the house as well.

Another witness, Anthony Grandberry, testified that he was at his girlfriend's house, which is next door to Coleman's house, on July 5, 2002. He testified that shortly after midnight he went outside to take the trash to the curb. While doing so, he noticed a burgundy car drive down the street and park facing Coleman's house. Grandberry testified that while he walked back into his girlfriend's house, he heard approximately five shots. He went into the house and got on the floor.

Coleman testified that when the shooting stopped, she looked out the window and saw that defendant had left. Franklin testified that he saw defendant drive away. Coleman testified that defendant called her again after the shooting was over. She testified that defendant was calm and asked again to meet with her. She testified that she hung up the phone, went downstairs and went next door to verify that none of her neighbors were injured.

Officer Robert Ludd of the Pontiac Police Department testified that the Police Department dispatched him to Coleman's house on July 5, 2002. His partner, Officer Miller, accompanied him. Officer Ludd testified that the shooter was no longer at the home when he and Officer Miller arrived. He further testified that Coleman showed him the driveway where the shooter, who she identified as defendant, had been parked. Officer Ludd testified that he went to the driveway and found three .380 caliber shell casings on the ground, that appeared new, like they had not yet been exposed to the elements. He testified that he collected the casings for evidence.

Officer Ludd testified that after he collected the casings, returned to Coleman's house, and reported his findings to Officer Miller, both Officers Ludd and Miller began to look for damage to the house. Officer Ludd testified that neither he nor Officer Miller saw any obvious damage to the house; however, it was dark at the time they looked and they did not check the roof for damage.

Sergeant Timothy Ketvirtis of the Michigan State Police testified at trial as an expert in firearms. Sergeant Ketvirtis testified from evidence presented to him and did not visit the scene of the crime. He testified that if the bullets used hit the vinyl siding, they could possibly cause some visible damage but depending on the angle at which they were fired, the bullets might not necessarily penetrate the vinyl siding.

Another Pontiac Police officer, Robert Elinski, testified that dispatch notified officers on duty to be on the lookout for a car looking like defendant's based on the information that Coleman

had provided the police about the incident. Officer Elinski testified he was on patrol that night and found a car similar to defendant's in a party store parking lot, located approximately between two and one-half to four miles from Coleman's house. Officer Elinski testified that defendant sat in his car and looked as though he planned to leave the parking lot when the officers arrived. He testified that he detained defendant and notified other officers that he had a possible suspect. Both Officer Elinski and Coleman testified that officers brought Coleman to the party store parking lot, and she identified defendant as the shooter. Officer Elinski testified that the police officers then arrested defendant. He further testified that he searched defendant's car but did not find a gun, nor did he find a gun in the area surrounding the car. Before the prosecution rested, the prosecution and defendant stipulated that defendant was a convicted felon at the time of the incident, and that less than five years had passed from the expiration of defendant's parole or probation for that felony.

Defendant presented Melissa Posten as a witness. Posten testified that she previously had a relationship with defendant and that she had spoken with Coleman several times on the phone. Posten testified that in their conversations, Coleman was upset over Posten's relationship with defendant and threatened to retaliate against defendant as a result. Defendant also called Kwaysee Williams, defendant's cousin, as a witness. Williams testified that he saw defendant and Coleman together, kissing and hugging, on July 3 and July 4, 2002.

In rebuttal, the prosecution re-called Coleman as a witness. Coleman testified that she had stopped having a romantic relationship with defendant in May and that Posten was defendant's girlfriend. Coleman also testified that Posten and defendant had telephoned her on a three-way call on three separate occasions, one before the shooting and two after the shooting. Coleman testified that in the two calls after the shooting, defendant warned Coleman against testifying and asked her to drop the charges. Coleman testified that she did not threaten to retaliate against defendant.

A jury convicted defendant of felon-in-possession, discharge of a firearm at a dwelling, and two counts of felony firearm. The trial court sentenced defendant to fifty-eight months to twenty years' imprisonment for felon-in-possession; three to fifteen years' imprisonment for discharge of firearm at a dwelling; and two consecutive two-year terms for felony firearm. Defendant now appeals.

II. Standard of Review

This Court generally reviews claims of prosecutorial misconduct on a case-by-case basis to determine whether the trial court denied defendant a fair trial. *People v Hicks*, 259 Mich App 518, 522; 675 NW2d 599 (2003), citing *People v Bahoda*, 448 Mich 261, 267; 531 NW2d 659 (1995). However, we review unpreserved claims of prosecutorial misconduct to determine whether a plain error occurred that affected the defendant's substantial rights. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), citing *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999).

Claims of ineffective assistance of counsel present a mixed question of fact, which is reviewed for clear error, and law, which is reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). However, when there has been no evidentiary hearing on defendant's claim that counsel was ineffective, the issue is unpreserved and our review is limited

to the facts on the record. *People v Bigelow*, 225 Mich App 806, 810; 571 NW2d 520 (1997), citing *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995).

III. Analysis

Defendant asserts that his federal and state rights to due process were violated by two instances of prosecutorial misconduct. He first argues that the prosecutor improperly vouched for the credibility of one of the prosecution's witnesses. We disagree.

In evaluating claims of prosecutorial misconduct, this Court examines the pertinent part of the record in context. *Schutte, supra* at 721, citing *People v Rice (On Remand)*, 235 Mich App 429, 435; 597 NW2d 843 (1999). We further examine the prosecutorial comments in question in light of both the arguments by defendant and the relationship the comments bear to the evidence presented. *Schutte, supra* at 721 citing *People v Jansson*, 116 Mich App 674, 693; 323 NW2d 508 (1982). A prosecutor cannot vouch for the credibility of a witness by implying that the prosecution has some special knowledge about the truthfulness of the witness' statements. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997) citing *Bahoda, supra* at 276. A prosecutor can argue that a witness is credible based on the facts presented in the case or that "the defendant or other witness is not worthy of belief." *Howard, supra* at 548 citing *Bahoda, supra* at 276.

We reject defendant's argument that the prosecutor vouched for the credibility of Tracy Coleman as a witness by stating in the prosecution's closing argument that the witness came to court and told the "truth." Placed in context, the prosecutor was responding to defendant's claim that Coleman retaliated against defendant by reporting his threats to the police. The prosecutor simply asked the jury to consider whether it was a reasonable response for Coleman, who had been shot at and had asked the criminal justice system for protection, to tell defendant he would go to jail if he continued to threaten her, and further asked the jury to consider whether it was proper for Coleman to tell defendant he would go to jail when he threatened to harm her more if "she shows up and does her duty and what she's supposed to do, come to court and tell the truth." The prosecutor did not argue that she had any special knowledge about Coleman's credibility, and her comments were not improper.

Defendant next asserts that the prosecutor committed misconduct by improperly introducing evidence that "was broader than the issue of whether defendant was guilty or innocent." Essentially, defendant's claim is that the prosecutor improperly introduced evidence of defendant's prior conviction for gun possession, and that this evidence was unduly prejudicial. We disagree. We first note that defendant failed to provide citations to the record in support of his claim that the prosecutor improperly introduced evidence of his prior conviction. MCR 7.212(C)(7). Defendant's failure to properly cite to the record constitutes abandonment of this issue. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). Regardless, it is well established in Michigan that *each* element of a criminal offense is "in issue" when a defendant enters a plea of not guilty, and that the prosecution must prove every element beyond a reasonable doubt even where the defendant specifically offers to stipulate to any of the elements. *People v Mills*, 450 Mich 61, 69; 537 NW2d 909 (1995). Because defendant's gun possession conviction was relevant to the charge of felon in possession, we find no error.

Defendant next asserts that his trial counsel rendered ineffective assistance, violating his Sixth Amendment rights. We disagree.

To sustain a claim for ineffective assistance of counsel, defendant must first prove that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel's deficiency led to an error so severe that counsel was not functioning as an attorney as guaranteed by the Constitution. *People v Hurst*, 205 Mich App 634, 640-641; 517 NW2d 858 (1994) (citations omitted). Second, defendant must prove that counsel's deficient representation resulted in prejudice against the defendant. *Hurst, supra* at 641. In doing so, defendant must overcome the presumption that the challenged action was trial strategy. *Hurst, supra* at 641. To show prejudice, defendant must show a reasonable probability that, but for counsel's error, the result of the trial would have been different. *People v Noble*, 238 Mich App 647, 662; 608 NW2d 123 (1999), citing *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994).

Limiting our review to the record since there was no *Ginther*¹ hearing we conclude that defendant fails to prove that his counsel's performance at trial was deficient. "Trial counsel is not required to advocate a meritless position. *People v. Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) citing *People v. Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995). Here, defendant argues that counsel's failure to object to prosecutorial misconduct was deficient. Because we find no instances of prosecutorial misconduct, defense counsel's failure to object was not deficient.

Affirmed.

/s/ Jane E. Markey
/s/ Kurtis T. Wilder
/s/ Patrick M. Meter

¹ *People v Ginther*, 390 Mich 436, 441-442; 212 NW2d 922 (1973).